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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 595

JOHN D. GLASS, PETITIONER

v.

HAROLD L. ICKES, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The District Court rendered no opinion. The opinion of the Court of Appeals (R. 11–26) is not yet reported.

JURISDICTION

The judgment sought to be reviewed was entered August 26, 1940 (R. 28). The petition for writ of certiorari was filed November 25, 1940. The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether under the circumstances of this case the Secretary of the Interior was absolutely privileged to release to the press and to the public a statement of the reasons why a former employee was barred from practice before the Department of the Interior.

STATEMENT

Petitioner brought this action to recover $750,000 damages for allegedly defamatory statements contained in a "Memorandum for the Press" released by the respondent Secretary on November 23, 1938 (R. 1–7).

The complaint sets forth (R. 3–5) the entire release. Therein, respondent advised oil operators to investigate before contributing to a fund being solicited by petitioner. Respondent pointed out that in letters written for this purpose petitioner stated that he was seeking "immediate reforms in the Connally Hot Oil Act[1] enforcement" and that he was also advocating changes in existing legislation (R. 3–4). The complaint does not allege that these statements in the release were false.

The statements alleged to be defamatory are as follows (R. 3–4):

> Mr. Glass has been barred from practice before the [Interior] Department. The Courts to date have refused Mr. Glass' prayer that this action be enjoined

[1] Act of February 22, 1935, c. 18, 49 Stat. 30, as amended, 15 U. S. C., Supp. V, Sec. 715 *et seq.*

* * *. The record shows that prior to September 15, 1937 Mr. Glass was chief investigator of the Federal Petroleum Agency No. 1 in the Department of the Interior, the investigative agency of Federal Tender Board No. 1. Effective September 15, 1937 he resigned his position in order to practice law at Tyler, Texas. A Departmental regulation promulgated by Secretary Ickes in March of 1933 provides that no ex-employee of the Department may practice before the Department or any of its agencies or boards for two years after his services with the Department are terminated. This regulation is to prevent Government employees selling confidential knowledge and experience. Contrary to such regulation Mr. Glass attempted to represent one Everett Brewer in a proceeding before the Federal Tender Board. Prior to his resignation Mr. Glass had supervised a matter in which Mr. Brewer was concerned and has initialed and signed memoranda to his superior, the Director of the Federal Petroleum Agency, in which he had recommended that certain action be taken. After Mr. Glass resigned Mr. Brewer was subpoenaed by the Federal Tender Board to appear before the Board and testify in this very matter.

When these facts were called to the attention of the Secretary of the Interior, he pointed out to the Federal Tender Board the existence of the Departmental regulation and instructed the Federal Tender Board that it be governed thereby in the event any

> former employee should appear before the Board. Mr. Glass was thereafter prevented from practicing before the Board.

The complaint alleges that the quoted matter was intended to convey the thought that petitioner had been barred from practicing before the Federal Tender Board because of an attempt to misuse information and knowledge confidentially obtained while in the employ of the Government (R. 2); that the statements were false and defamatory (R. 5); and that the ruling of the Federal Tender Board did not reflect on petitioner's character or reputation (R. 5–6). The complaint alleges that petitioner had been damaged in the sum of $250,000 and that in addition he was entitled to exemplary damages in the sum of $500,000 (R. 6).

Respondent moved to dismiss on the ground that the complaint failed to state a cause of action (R. 7). The motion was granted and judgment was entered dismissing the action (R. 7–8). The Court of Appeals affirmed (R. 28). It declined (R. 16) to pass upon the defamatory character of the statements on the ground that the press memorandum was an official communication and hence that, in making it, the Secretary was absolutely privileged (R. 25, 26).

ARGUMENT

The head of an executive department of the United States cannot be held liable to a civil suit for damages on account of action in relation to the

matters committed by law to his control or supervision. *Spalding* v. *Vilas*, 161 U. S. 483, 498–499. As the court below held (R. 24, 25), that principle controls here. The respondent had issued a regulation, the validity or propriety of which is not questioned, which barred petitioner from representing others before agencies of the Department of the Interior administering the Connally Act. The Secretary was authorized to advise persons subject to the Act that petitioner could not represent them before the Interior Department. The method which he employed for this purpose was unexceptionable. "It seems obvious that, to communicate information respecting the appellant's [petitioner's] incapacity to the indefinitely large group of persons with rights subject to the Act, publication of an announcement in the press was proper, if not essential" (R. 25). It follows that the Secretary was absolutely privileged to make the press memorandum. *Spalding* v. *Vilas*, 161 U. S. 483, 498–499; *Mellon* v. *Brewer*, 18 F. (2d) 168, 171–172 (App. D. C.), certiorari denied, 275 U. S. 530; cf. *Bradley* v. *Fisher*, 13 Wall. 335, 350–351; *Standard Nut Margarine Co.* v. *Mellon*, 72 F. (2d) 557, 559 (App. D. C.), certiorari denied, 293 U. S. 605; *Cooper* v. *O'Connor*, 99 F. (2d) 135 (App. D. C.), certiorari denied, 305 U. S. 642.

Petitioner, nevertheless, contends (Pet. 8, 17–21) that in fact the Secretary issued the press release only to defeat petitioner's efforts to effect changes

in the Connally Act. Since it may be assumed for the purposes of this case that the Secretary is under no duty to oppose changes in existing legislation, a statement issued for that purpose might not be action in relation to matters committed by law to the control or supervision of the Secretary. However, there is no basis in fact for petitioner's contention. It is premised solely upon his assertions (Pet. 18–22) that, at the time the statement was released, the Secretary had no reason to make known that petitioner could not represent others before agencies of the Department. The assertions are unwarranted. As the Court of Appeals stated (R. 25–26):

> It may be observed in passing that it appears from the uncontradicted parts of the press release in question, that the Secretary issued it at a not inappropriate time. The appellant [petitioner] first attempted, unsuccessfully, to appear in a representative capacity before the Federal Tender Board, an agency charged with enforcement and administration of certain phases of the Act. Later, he circularized a large number of oil operators soliciting funds to assist, among other things, his efforts to secure "immediate reforms in the Connally Hot Oil Act *enforcement*." [Italics supplied (by the court).] It would not appear entirely unreasonable under these circumstances for the Secretary to conclude that it might be desirable to warn prospective client-donors

> that the appellant could not then appear in representative capacity before the administrative agencies charged by law with the enforcement of the Act.

Petitioner concedes (Pet. 16) that, upon this view of the facts, the decision below is probably correct.

Moreover, petitioner's opinion that the Secretary's announcement was unnecessary is irrelevant. As this Court held in *Spalding* v. *Vilas*, 161 U. S. 483, 498–499:

> In exercising the functions of his office, the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government, if he were subjected to any such restraint. *He may have legal authority to act, but he may have such large discretion in the premises that it will not always be his absolute duty to exercise the authority with which he is invested.* But if he acts, having authority, his conduct cannot be made the foundation of a suit against him personally for damages * * *. [Italics added.]

Similarly, respondent's motives in exercising his authority in this instance may not become the subject of inquiry in this suit.

Petitioner seeks to review the application to the facts of this case (Pet. 8, 9) of principles of law which he concedes (Pet. 7, 12–15) to be well settled. The decision below merely holds that when, pursuant to a regulation promulgated by the Secretary of the Interior, a former employee is barred from practicing before agencies of the Department charged with enforcement of the Connally Act, the Secretary is absolutely privileged to issue to the press and public a statement of the reasons for the bar. The court has not held, as petitioner asserts (Pet. 9–11, 15–16), that the Secretary of the Interior has absolute immunity from liability for defamation if he refers to the Connally Act. The court expressly declined (R. 18, n. 5; R. 19) to ascribe any such effect to its decision.

CONCLUSION

The decision of the Court of Appeals is correct and presents neither a conflict of decisions nor a question of general importance. Therefore, it is respectfully submitted that the petition for a writ of certiorari should be denied.

FRANCIS BIDDLE,
Solicitor General.

DECEMBER 1940.

U. S. GOVERNMENT PRINTING OFFICE: 1940